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Before the
FEDERAL COMMUNICATIONS COMMISSION
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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

In the Matter of)

Implementation of Sections 12 and 19)
of the Cable Television Consumer)
Protection and Competition Act of 1992)

MM Docket No. 92-265

Development of Competition and)
Diversity in Video Programming)
Distribution and Carriage)

REPLY COMMENTS OF THE SATELLITE BROADCASTING
AND COMMUNICATIONS ASSOCIATION OF AMERICA

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SUMMARY

The Satellite Broadcasting and Communications Association of America ("SBCA") and its members support the Commission's efforts both to foster competition and to prohibit unfair or anticompetitive actions without unnecessarily restraining legitimate business practices. The wide range of comments in this proceeding, however, show that it would be very difficult, if not impossible, for the Commission to establish across-the-board parameters that will absolutely define discrimination in all cases.

Instead of attempting to delineate such detailed parameters -- which would inevitably be both underinclusive and overinclusive -- the Commission should establish only broad parameters and then consider complaints on a case-by-case basis. Because SBCA is aware of the Commission's limited resources, however, we propose a streamlined adjudicatory process to facilitate the resolution of complaints. It contains a screening phase that would enable the Commission to weed out meritless complaints prior to investing significant resources. It is also expressly designed to encourage the early resolution of complaints by negotiation of the parties. The subsequent adjudicatory phase contains an option for alternative dispute resolution to again minimize the impact on Commission resources. The procedures SBCA proposes will be flexible enough to accommodate differences in competitive and market situations that can result in justifiable price differentials, while eliminating actual discrimination, "the

purpose or effect of which is [in the words of the Act] to hinder significantly or to prevent any multichannel video programming distributor from providing satellite cable programming or satellite broadcast programming to subscribers or consumers."

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**REPLY COMMENTS OF THE SATELLITE BROADCASTING
AND COMMUNICATIONS ASSOCIATION OF AMERICA**

Pursuant to the Notice of Proposed Rule Making released by the Commission on December 24, 1992 in the above-captioned proceeding, the Satellite Broadcasting and Communications Association of America ("SBCA") hereby submits these reply comments.

INTRODUCTION

The SBCA is a national trade association with approximately 600 members representing all segments of the home satellite television industry.¹ These segments are:

- satellite programmers (e.g., Home Box Office, Turner (CNN, TNT), and ESPN) that offer news, entertainment, movies and sports to home satellite dish ("HSD") subscribers,

¹ A list of representative members is attached to these Reply Comments.

- satellite systems operators (e.g., GE Americom and Hughes Communications) that manufacture and launch satellites and lease transponder space to programmers,
- direct broadcast satellite ("DBS") providers (e.g., Hubbard, DirecTv, Echosphere, Primestar and NRTC), that deliver packages of program services to subscribers on a national basis,
- manufacturers of satellite reception equipment (e.g., Zenith, Toshiba, Chaparral, Houston Tracker, California Amplifier, and General Instrument),
- satellite carriers (e.g., United Video, Liberty Media, Eastern Microwave and Primetime 24) that uplink broadcast signals for retransmission to home satellite dish subscribers, and
- local, regional and national distributors, program packagers and retailers of satellite hardware and program services (e.g., Consumer Satellite Services, Warren Supply and NRTC) that deal directly with consumers at "point of sale."

Given this wide variety of member interests represented by SBCA, SBCA hopes that the Commission will find the views presented here particularly credible and helpful in this proceeding to implement the program access provisions of

Sections 12 and 19 of the Cable Television Consumer Protection and Competition Act of 1992 ("the Act"). The views presented here represent an approach that balances the varied interests of SBCA's members. Of course, this wide representation and variety of interests also mean that the scope of issues addressed in these reply comments is limited. On these issues, however, we are well situated to present to the Commission the distinctive and timely views of many disparate interests involved in video production and delivery.

SBCA and its members support the Commission's efforts to foster competition and prohibit unfair or anticompetitive actions without unnecessarily restraining legitimate business practices. At the same time, however, SBCA urges to the Commission to avoid opening the proverbial "Pandora's box" by taking action that would require programmers to renegotiate every existing contract governing delivery of their product. It would serve no one's interest, and certainly not the public's interest, to cause a massive disruption of the marketplace.

I. THE COMMENTS DEMONSTRATE THAT IT WOULD BE DIFFICULT, IF NOT IMPOSSIBLE, FOR THE COMMISSION TO PRESCRIBE IN ADVANCE DETAILED PARAMETERS TO PROHIBIT DISCRIMINATION WITH RESPECT TO PRICE, TERMS OR CONDITIONS.

The wide range of comments and proposals filed in this proceeding demonstrates the practical difficulties of prescribing, in advance, across-the-board parameters that absolutely define discrimination in price, terms, or

conditions. More specifically, the diverse practices and problems highlighted by commenters make it clear that overly detailed parameters might inadvertently sweep in many practices that are not in fact discriminatory, while missing many instances of actual discrimination. Simply put, the comments demonstrate that price differentials or differences in terms and conditions may or may not be evidence of actual discrimination.

The Commission's task under the Act is to prevent discrimination, "the purpose or effect of which is to hinder significantly or to prevent any multichannel video programming distributor from providing satellite cable programming or satellite broadcast programming to subscribers or consumers," Section 628(b) of the Act. The Commission must, however, be careful not to stifle the marketplace. Accordingly, the Commission should establish only broad parameters in advance and then consider complaints on a case-by-case basis as described in more detail below.² Only in this manner can the Commission discern the unique characteristics of each case to assess whether differential treatment is, in fact, discriminatory. To this end, cognizant of the Commission's

2 Other commenters have also recognized that this is the best way to achieve the necessary degree of balance. See, e.g., Comments of the Motion Picture Association of America, Inc. at 6 ("[I]t is neither possible nor necessary to define in advance every type of [prohibited] conduct. . . . [The desired] result can be accomplished through generic language, perhaps amplified by illustrative examples . . ." and enforced through "individual complaints") (proposing an enforcement mechanism for Section 616).

limited resources, SBCA proposes in these Reply Comments an adjudicatory process that is streamlined as much as possible. While case-by-case adjudication might seem burdensome to the Commission in the short run, precedents established will quickly provide guidance to the market and reduce further complaints. Any other mechanism could, unwittingly, either stifle the ability to provide services that simply reflect different competitive and market situations, or conversely exclude in advance relief for true instances of violation of the Act.

Only a case-by-case process will be flexible enough to accommodate differences in competitive and market situations that can result in justifiable differentials in price, terms or conditions. There are, for example, at least three principal types of program services covered by this section of the Act,³ and the incentives to market these services to HSDs vary. First, there are premium channels, which are supported by subscription fees on either a per channel or per program basis. Consequently, each subscriber has incremental importance to the programmer's revenues. Second, there are advertiser-supported services, which are supported both by commercial advertising and by subscriber fees. Because advertisements are sold on the basis of the numbers of viewers, additional viewers matter only if they are sufficiently large in number to affect advertising rates. Third, there are superstations, some of which have

3 Other services, such as over-the-air broadcast services, are covered elsewhere in the Act.

always served the cable market, and, more recently, others that have been launched as superstations to serve the HSD market, with cable as an ancillary market.

In addition, there are many different types of distribution systems, including cable, MMDS, SMATV, HSD, and DBS. Each of these distribution systems has a different geographic focus -- national, regional or local -- which, in turn, results in different costs for advertising, marketing, distribution and service. Further, even within the HSD market, HSD subscribers can obtain their programming from a variety of sources -- equipment dealers, third-party packagers, or directly from programmers -- each of which has differences in cost and distribution structures.

In short, simple price differentials might merely reflect market or service differences such as those described above.⁴ Similarly, price disparities could simply reflect the differences in resources -- both personnel and financial -- that some programmers invest in distribution systems, the differences resulting from service to cable versus HSD markets,

⁴ Superstations are one example. Frequently there are significant price differences between the cable and HSD markets, but the higher HSD price is not necessarily discriminatory. Rather, the price difference is due, at least in significant part, to the facts that: (1) cable systems pay lower copyright fees so long as they carry only a limited number of superstations; (2) the passage of the Satellite Home Viewer Act of 1988 stimulated the creation of additional superstations with HSD as their primary market and cable as their secondary market, with different economic bases for each market; and (3) satellite carriers incur different costs to serve HSD subscribers as opposed to cable subscribers.

or the differences resulting from any number of other factors uniquely applicable to serving varying distribution systems.

The existence of different terms and conditions may also simply reflect different market conditions. See, e.g., Comments of Viacom International Inc. at 16-17 (listing factors that bear on negotiation of contract provisions). As indicated by the varying lists of discriminatory practices offered by numerous commenters, it would be nearly impossible for the Commission to examine and delineate each and every term and condition in advance, let alone define which differentials constitute discrimination. Compare, e.g., Comments of the Motion Picture Association of America, Inc. at 10-11 (offering a list of 9 examples of discriminatory practices) with Comments of Consumer Satellite Systems, Inc. at 15-16 (offering a list of 7 examples of discriminatory practices with almost no overlap with MPAA's list).

II. THE COMMISSION SHOULD ESTABLISH A CASE-BY-CASE PROCEDURAL MECHANISM TO RESOLVE COMPLAINTS OF DISCRIMINATION UNDER SECTION 628.

In this section, SBCA proposes a step-by-step procedural mechanism the Commission could use to resolve discrimination complaints under Section 628 of the Act. The outlined procedure should provide the Commission with the flexibility it needs to account for variations in distribution services and market conditions, while at the same time minimizing the Commission resources that must be devoted to complaint resolution.

A. First Phase: Screening

The first phase of this procedure would be a screening phase (consisting of three steps) designed to minimize the risk of frivolous complaints. As described in more detail below, first the complainant would have to establish that it has standing, that there is evidence of a differential price, term or condition, and that all other requirements of the Act and the Commission's rules thereunder are met. Second, the defendant would then have the opportunity to refute any or all of this evidence. Third and finally, the Commission would conduct a final screen based on a simple checklist to decide if the complaint should be dismissed or should proceed to the next phase.

1. Step 1: Complaint

As the first step, the complainant must establish that it has standing under the Act, that there is evidence of a differential in price, terms or conditions, and that all other requirements of the Act and the Commission's rules are met. Specifically, with regard to standing, Section 628 states that: "Any multichannel video programming distributor aggrieved by conduct that it alleges constitutes a violation [of this section] may commence an adjudicatory proceeding at the Commission" (emphasis added). While a "multichannel video programming distributor" is not defined in this section, it is defined in Section 602 of the Act as "a person such as, but not limited to, a cable operator, a multichannel multipoint

distribution service, a direct broadcast satellite service, or a television receive-only satellite program distributor, who makes available for purchase, by subscribers or customers, multiple channels of video programming." While the scope of this definition is somewhat unclear, Congress clearly intended to limit standing to file complaints under Section 628 to such distributors. If the complainant does not meet this definition (as clarified by the Commission), the complaint would be dismissed for lack of standing.

The complainant must also allege and provide evidence of a differential in price, terms or conditions of service. This evidence could consist of direct documentary evidence or, if unavailable, the signed declaration of the complainant. This declaration must be based on the complainant's good faith knowledge and belief of a discriminatory price, term or condition.⁵ A mere allegation unaccompanied by any such evidence would be dismissed as a frivolous complaint.

Finally, as the last part of this step, the burden would be on the complainant to demonstrate that the remaining requirements of the Act and the regulations thereunder have been met -- including, for example, any requirements the

⁵ SBCA proposes that the Commission rely on signed declarations based on the complainant's good faith knowledge to avoid the discovery rights that would otherwise have to be afforded to the complainant at this juncture.

Commission may adopt regarding attribution, a "reasonable region" of price differential,⁶ or harm.

2. Step 2: Rebuttal

The defendant has the option at this juncture to prove that the complainant does not have standing, that the complainant's allegation of a differential (justified or not) is factually incorrect, or that any other requirements under the Act or the Commission's rules have not been met. Alternatively, the defendant could prove at this stage that the allegation is based on a comparison of non-contemporaneous evidence. The Commission should permit complaints based only upon the comparison of reasonably concurrent contracts because otherwise the likely varying market circumstances would skew the comparison. Proof of these defenses would be presented confidentially to the Commission, see 47 C.F.R. § 0.459, and these documents would be available to the complainant with any confidential or proprietary information unrelated to the defense redacted.

3. Step 3: Final Screening

In the third and final step of the screening phase, the Commission would determine if the complainant has met the requirements described above. The Commission staff should be

⁶ SBICA does not take a position as to which of these mechanisms should be adopted. If, however, the Commission adopts a "reasonable region," it must account for the fact that a range based on percentage differentials may not adequately account for fixed costs.

able to take a check list of these requirements and readily ascertain if the complaint meets them. Based on this list, the Commission would determine if the complaint should be dismissed or should proceed to second phase.

B. Second Phase: Negotiation

In this phase, the Commission would instruct the parties to attempt to negotiate a settlement. The parties would be given 20 days to negotiate in good faith. By requiring this negotiation process, the Commission can encourage the early resolution of as many disputes as possible, thereby minimizing the unnecessary use of limited Commission resources. If, at the end of the 20 days, the parties have not reached a settlement (or, jointly, requested an extension of time to continue negotiation), the process would shift back to the Commission for the continuation of the complaint process.

C. Third Phase: Adjudication

1. Step 1: Justification of Differential

If the complaint is not dismissed in the screening phase or settled in the negotiation phase, the complaint would move to the third phase, the adjudication phase (which would consist of three additional steps). In the first step of this phase, the burden would shift to the defendant programmer to justify a legitimate basis for the differential shown. At this stage, the Commission should still rely exclusively upon written submissions. Additionally, as in the first step of the screening phase, the party bearing the burden -- here the

programmer -- must verify the facts presented. Such verification could be presented confidentially to the Commission, see 47 C.F.R. § 0.459, and turned over to the complainant only if the Commission finds the justification sufficiently legitimate to move to the second step. Further, any confidential or proprietary information included in these documents that is unrelated to the complaint or defense could be redacted prior to disclosure to complainant.⁷

2. Step 2: Adequacy of Justification

Assuming that the programmer offers a legitimate justification with supporting documentary evidence, the second step of the adjudication phase would shift the burden back to the complainant to show that the proffered justification is either a pretext or is inadequate to justify the differential treatment. In order to do this, the complainant would likely need access to some additional discovery, although SBCA encourages the Commission to limit this discovery only to the precise issues raised in the defense in order to prevent a lengthy discovery process that would unnecessarily consume the time and resources of the Commission and the parties. As in

⁷ Other commenters offer similar solutions for this concern about confidentiality. See, e.g., Comments of Rainbow Programming Holdings, Inc. at 19 (requiring complainant to show need for confidential or proprietary information); Comments of Motion Picture Association of America, Inc. at 11-12 (suggesting contracts be made available but with proprietary terms redacted except in appropriate cases); Comments of Viacom International Inc. at 24-25 (information should initially be submitted to the Commission in camera, and proprietary information not related to the complaint should be redacted from responses to discovery requests).

the first step, proprietary information unrelated to the specific allegations or defense could be redacted from the responsive documents provided to complainant (and presented confidentially to the Commission).

3. Step 3: Complaint Resolution

Finally, in the third step, the Commission could request from the parties any additional evidence or information it deems necessary to resolve the complaint. This information could be in either written or oral form as determined by the Commission.

D. Decisionmakers

To make the determinations necessary under the first and third phases of this process, the Commission should provide the parties with the option of alternative dispute resolution ("ADR"). If both parties do not agree to ADR, the Commission could make these determinations in one of two ways: (1) through the use of administrative law judges ("ALJs"); or, alternatively, (2) through the use of a set group of designated Commission staff members, who would decide all such complaints for consistency. The determinations of any of these decisionmakers (non-government arbitrators, ALJs, or Commission staff) then would be appealable to the full Commission.

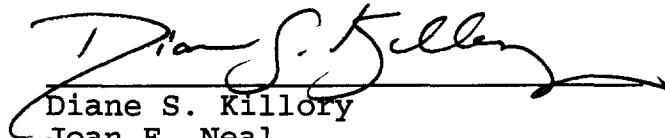
III. PURSUANT TO SECTION 628 OF THE ACT, THE COMMISSION SHOULD PERMIT EXCLUSIVE CONTRACTS OF REASONABLE TERM LENGTH FOR NEW SERVICES.

In order to encourage the development of new services, the Commission should permit exclusive contracts of reasonable term length for these services. Because it is impossible to determine now the amount of flexibility that might be needed for new services in the future, any other rule could severely hinder the growth of these services because short-term contracts may not provide sufficient economic benefit to encourage development. SBCA encourages the Commission to adopt a liberal period of exclusivity for precisely this reason. See, e.g., Comments of Time Warner Entertainment Company, L.P. at 45 ("A promise of exclusivity for less than ten years may not be sufficiently valuable to distributors to persuade them to carry a new service"); Comments of Viacom International, Inc. at 36-37 (for example, exclusive agreements for new foreign language cable service "encourage investment in and carriage of new services and will enable the cable operator to develop marketing plans to increase the viability of the new program service"; suggesting 10-year term as reasonable); Comments of Continental Cablevision, Inc. at 21-22 (for example, exclusive agreements are necessary to give a new regional news cable service "time to take root and to give the distributor an incentive to actively market the service, knowing that it will not be promoting the service for a 'free rider' competitor. . ."; suggesting a minimum 7-year term as reasonable).

CONCLUSION

For the foregoing reasons, SBCA urges the Commission to develop broad parameters only in the present proceeding, and to adopt a case-by-case process for the resolution of complaints filed under Section 628 of the Act. Any other approach runs the risk of condoning truly discriminatory conduct and prohibiting legitimate business practices that could stifle the growth of the video marketplace.

Respectfully submitted,



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